

RECEIVED

FEB - 5 1996

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter Of)
)
Definition of Markets for Purposes)
of the Cable Television Mandatory)
Television Broadcast Signal)
Carriage Rules)

CS Docket No. 95-178

To: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS

Costa de Oro Television, Inc. ("Costa"), by its attorneys and pursuant to Sections 1.415 of the Commission's Rules, hereby files its Comments in the above-captioned proceeding dealing with the market definition process to be utilized by the Commission in connection with the 1996 round of must-carry/retransmission consent elections. In support thereof, Costa states as follows.

1. In the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 ("1992 Cable Act"), television broadcast stations were presented with the option of seeking retransmission consent agreements with cable television operators or asserting mandatory carriage rights on the cable systems located within the stations' markets. For station licensees choosing the latter course, the 1992 Cable Act and the Rules (Section 76.55(e)) provide that a station's market, for cable carriage, is to be defined as the Area of Dominant Influence ("ADI") for the station, as established by the Arbitron

No. of Copies sent
List ABCDE

024

Ratings Company ("Arbitron"), a private entity that provided audience measurement information for the radio and television industries.¹

2. The determination as to whether a television station licensee seeks retransmission consent or must-carry treatment for its station is a triennial process. The initial determination was made in 1993. Consistent with this schedule, a second election will have to be made by television station licensees by October 1, 1996, with such election effective on January 1, 1997. Section 76.64(f)(2).

3. As part of the triennial determination process, the Commission, in drafting Section 76.55(e), added a Note providing specific direction as to which Arbitron determination would be dispositive. In 1993, the ADI assignments contained in the "1991-92 Television ADI Market Guide" ("1991-92 Guide") were to be used. For 1996, the 1994-95 version of the Television ADI Market Guide would provide the necessary information.

4. Were it not for changes involving the Arbitron organization, this rulemaking process would not be necessary. Arbitron, in 1993, terminated its television measurement services and, with it, the assignment of counties to ADIs. In fact, Arbitron, for its ongoing radio audience measurement services has

¹ In the legislative history to the 1992 Cable Act, the Congress made reference to the ADI system, because "ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-based definition." H. Rep. 102-628, 102d Cong., 2d Sess. (1992) at p. 97.

adopted the market definitions, known as Designated Market Areas ("DMA"), prepared by Nielsen Media Research, the sole entity that now measures television audiences on a nationwide basis. The instant proceeding is intended to address the impact of there being no new market information from Arbitron for the 1996 round of elections and what procedures the Commission should adopt to deal with this change in circumstances.

4. In the NPRM, the Commission suggests three possible mechanisms for dealing with the standards for market determination: (1) adopt the Nielsen DMAs, (2) use the existing ADI information derived from the 1991-92 Guide, or (3) retain the ADI definitions from the 1991-92 Guide for the 1996 elections but agree to shift to Nielsen DMAs for future elections. The Commission further states that its inclination is to continue to utilize the assignments contained in the 1991-92 Guide. Costa submits that the continued use of the 1991-92 Guide is at odds with the statutory requirement for triennial elections as to retransmission consent or mandatory signal carriage (47 U.S.C. 325(b)(3)(B)), fails to allow for consideration of changed circumstances, and represents a poor policy choice in the face of the availability of updated audience measurement information.

5. In adopting the Note to Section 76.55(e), the Commission correctly decided that the triennial election should be accompanied by updated market listings. It did so by proposing to use the latest market listings that Arbitron issued prior to the election cycle. That Arbitron is no longer preparing market

definitions is an insufficient basis, of itself, upon which to alter this decision to have the retransmission consent/must-carry elections premised on current viewing measurements. This is especially significant in light of the fact that updated market definitions are readily available in the form of the Nielsen DMAs.

6. The Commission's reasoning in support of the status quo is insufficient to reverse the earlier determination that market updating is necessary. First, we are told that the continued use of the 1991-92 Guide promotes stability in the process. There is nothing unstable about the use of triennial elections and the change allows for marginal market redefinitions to be effected. In fact, unless parties are able to make their retransmission consent or mandatory carriage election based on current information, the Commission is impermissibly altering the election process established by Section 325 of the Communications Act. Parties that might have changed their decision, from retransmission consent to mandatory carriage, or vice versa, based on a change in market, are prohibited from doing so. In effect, the election process is of no significance if the parties are locked into a changed marketplace without being able to make use of the changes.

7. The change to a DMA-based system is not a drastic one and the existing rule itself was premised on the parties accepting the changes between the 1991-92 Guide and the most recent one. Is

there a significant difference between DMAs and revised ADIs?² In that we believe that there is no wholesale difference between ADIs and DMAs, the Commission is not looking at major alterations in cable carriage by cable television systems. Also, Costa submits that Section 641(h) modifications are not impaired by this process. If parties determine further changes are necessary, they retain the right to seek further modifications through the special relief process. This process is in place and can be used at any time by television licensees or cable operators.

7. The failure to make the change to the Nielsen DMAs is of particular importance to Costa. Costa is the licensee of Station KSTV(TV), Ventura, California (the "Station"). The community of Ventura is part of the Los Angeles ADI and, by application of Section 76.55(e), the Station should be entitled to mandatory carriage in the Los Angeles ADI. However, when Arbitron published the 1991-92 Guide³, it contained a statement that the

² Costa understands that between its 1988-89 Guide and the 1991-92 Guide, there were changes involving 94 counties. If the DMA method is adopted, there will be approximately 120 county changes. While there is no means to know what the number of changes would have been if Arbitron was still determining ADIs, the shift to a DMA-based system is not a dramatic one.

³ Costa was never a subscriber to Arbitron's audience measurement surveys and was not entitled to examine the copyrighted information. In fact, to this day, Arbitron has never provided Costa with the 1991-92 Guide. It is Costa's understanding that the Commission will not allow the public to view copies of the 1991-92 Guide in its possession. Despite this, the Commission is asking Costa to be bound by this mysterious, privately produced document that cannot be examined in any public setting.

licensee of the Station had requested that the Station be reported in the Santa Barbara-Santa Maria-San Luis Obispo, California ADI. Costa has no record of ever making such a request and Arbitron has been unable to provide to Costa any evidence as to why the statement was included in the publication.

8. However, the statement was sufficient for the cable operators that Costa requested must-carry treatment from to deny carriage and require the matter be litigated. In considering Costa's Complaints, the Cable Services Bureau, in Memorandum Opinion and Order, DA 95-1828, released August 23, 1995, held that the 1991-92 Guide prevailed and Costa was bound by the erroneous information contained in the publication.⁴

9. The Nielsen DMA listings clearly provide that the Station is within the Los Angeles DMA. Thus, there will be no issue as to the Station's entitlement to must-carry treatment in the television market where it is located and where it provides its service. If this change is not made, Costa may well be tied, at least for three years, to an incorrect market definition contained in a privately published book that Costa did not know of and had no legal right to see. It is patently unfair to place Costa in the position of having its cable carriage determined by information that is incorrect in the first place and which is not included in the only current audience measurement data available (i.e., the DMA data).

10. Finally, the Commission must take note of the recent

⁴ Costa has filed for reconsideration of this decision.

Congressional action in regard to audience measurement data. In the Telecommunications Act of 1996, approved by the Congress on February 1, 1996, Section 614(h)(1)(C) is amended to include the following language in lieu of the reference to Section 73.3555(d)(3(i): "by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns." Costa submits that the only commercial publication now available delineating viewing practices is the Nielsen DMA information and it must be used by the Commission.

11. Under the circumstances, Costa submits that the Commission should adopt the most recent guide issued by Nielsen spelling out the DMAs. If, instead, the Commission elects to continue to use the 1991-92 Television ADI Market Guide, it must also allow a television station licensee the right to rely on any differences between the most recent DMA market definitions and those contained in the 1991-92 Guide, with the DMA market definitions prevailing.

12. Costa believes that the adoption of DMA based market definitions will allow for the required updating of market definitions and make the 1996 election process one that includes changes that have occurred in the information that served as the basis for the 1993 election. This is the only equitable means for

handling this matter and it should be adopted forthwith.

Respectfully submitted,

COSTA DE ORO TELEVISION, INC.

By: 

Barry A. Friedman
Thompson Hine & Flory
P.L.L.
Suite 800
1920 N Street, N.W.
Washington, D.C. 20036

(202) 331-8800

Its Attorneys

Dated: February 5, 1996